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1 Under 28 U.S.C. § 1332, a district court has original jurisdiction over civil actions between
2 citizens of different states, where the amount in controversy exceeds \$75,000. An action
3 brought in state court may be removed by the defendant to federal district court if the case
4 could have been brought there originally. Id. § 1441. If it appears that the federal court lacks
5 jurisdiction, the case must be remanded. Id. § 1447(c). Plaintiffs now argue that removal
6 is not proper because defendant Jessica Varela is an Arizona resident.

7 The burden of establishing federal jurisdiction is on the party seeking removal, and
8 the removal statute is strictly construed against removal jurisdiction. Emrich v. Touche Ross
9 & Co., 846 F.2d 1190, 1195 (9th Cir. 1988). In their notice of removal, defendants
10 acknowledge that Varela is an Arizona resident who has been properly served. Defendants
11 do not contend that Varela's joinder was fraudulent. Instead, they argue that plaintiffs have
12 acted affirmatively to dismiss their claims against Varela because (1) they have not taken her
13 default within 5 months of service of the complaint, (2) they have not served her with various
14 pleadings, and (3) they did not include her in the state court scheduling conference.

15 First, the removal notice is facially deficient because defendant Varela was properly
16 served, but has not consented to the removal. Generally, all properly served defendants must
17 join in the petition for removal except for nominal, unknown or fraudulently joined parties.
18 Id., at 1193 n.1; Destfino v. Reiswig, 630 F.3d 952, 956 (9th Cir. 2011). Because Varela has
19 not consented to the removal, the removal is defective. We grant plaintiffs' motion to
20 remand on this basis.

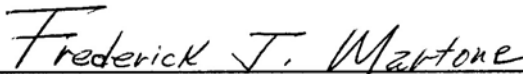
21 We also conclude that because Varela is an Arizona citizen, removal is improper
22 because there is no diversity. Defendants have not satisfied their burden of showing that
23 plaintiffs have voluntarily dismissed or abandoned their claims against Varela. No dismissal
24 has been filed nor have the pleadings been amended so as to alter Varela's status as a party
25 defendant. To be sure, the exclusion of Varela from participating in the state court
26 proceedings is either suspicious or sloppy, but plaintiffs now contend that they will prosecute
27 their claims against Varela. Therefore, based on lack of diversity, we conclude that removal
28 is not proper.

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IT IS ORDERED GRANTING plaintiffs’ motion for remand (doc. 21).

IT IS FURTHER ORDERED REMANDING this case to the Superior Court of
Arizona in Maricopa County.

DATED this 3rd day of October, 2011.



Frederick J. Martone
United States District Judge